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7 | REGIS HOUSE, JR, individually and on
behalf of others similarly situated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

11 LAWRENCE REGIS HOUSE, JR.,
12 individually and on behalf of others
similarly situated,

13 Plaintiff,

14 | VS.

15 CARRIER IQ, INC. a Delaware
16 Corporation, and DOES 1-100,
inclusive,

17 Defendants.

CASE NO.

CLASS ACTION

COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF

JURY TRIAL DEMANDED

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Richard W. Wickett
U.S. District Court
Clerk, Northern District of California
San Jose

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CLASS ACTION COMPLAINT

1 Plaintiff LAWRENCE REGIS HOUSE, JR., on his own behalf and all others
 2 similarly situated, brings this putative class action against Defendants CARRIER
 3 IQ, INC., and DOES 1-100, inclusive, as follows:

4 **I. NATURE OF THE ACTION**

5 1. Defendants have been and continue to be engaged in a scheme data
 6 theft the course of business of developing, selling and distributing software known
 7 as "Carrier IQ" (the "PRODUCT"). The PRODUCT secretly tracks, records and
 8 distributes private information from a consumer's smartphone, including without
 9 limitation, location data, keystrokes, contacts, passwords, and private
 10 communications in violation of the law and in disregard for the consequences that
 11 could be caused by such violation. Specifically, the smartphones affected include
 12 all models of smartphones with the Android operating system ("Android") installed.

13 Defendants' PRODUCT is installed *as an integral part* of Android, and is
 14 currently used by tens of thousands of smartphone users throughout California and
 15 the United States. Upon information and belief, CARRIER IQ developed the
 16 software integration of the PRODUCT into the Android operating system with the
 17 assistance of Android phone manufacturers and some of the largest cellular network
 18 carriers in the United States: AT&T, Sprint and T-Mobile ("Carriers"). The
 19 PRODUCT was subsequently installed on smartphones with the intent that the
 20 smartphones would be sold to the general public. The ostensible purpose of the
 21 PRODUCT is to monitor user activity and report the data to Carriers, smartphone
 22 manufacturers and other third parties. The PRODUCT goes too far in eavesdropping
 23 on user activity. Defendants' PRODUCT actively collects, records and transmits
 24 personal data and communications of putative class members without Defendants
 25 having received informed consent from the consumer, in violation of privacy and
 26 consumer protection laws. Defendants' PRODUCT facilitates their electronic data
 27 theft scheme by silently recording smartphone users' activity and transmitting it
 28 over the air to CARRIER IQ's servers where it is then stored and sifted through for

1 third party use. CARRIER IQ admits as much on its website where its states that
 2 the PRODUCT "automatically provid[es] accurate, real-time data direct from the
 3 source – your customers' handsets. Our powerful platform aggregates, analyzes and
 4 delivers that data via easy-to-use web applications that help wireless carriers make
 5 smart business decisions."

6 2. Plaintiff purchased an HTC Incredible smartphone installed with
 7 Android and the PRODUCT.

8 3. Upon information and belief, all currently known methods of disabling
 9 the PRODUCT will render Android smartphones unusable, constituting both a
 10 financial loss and property damage to the consumer. Indeed, this fact indicates how
 11 deeply the PRODUCT is integrated within the Android operating system.
 12 Defendants have left consumers with the choice of either having their every private
 13 use of the phone recorded and transmitted to various companies or suffering the
 14 economic and property loss of owning a phone that no longer works.

15 4. Defendants' conduct violates the Federal Wiretap Act, 18 U.S.C. §§
 16 2511. *et seq.*; the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030, *et seq.*; the
 17 California Consumer Protection Against Spyware act; California Penal Code §§ 631
 18 and 637.2; Consumer Legal Remedies Act, California Civil Code §§ 1750 *et. seq.*
 19 ("CLRA") and California Business & Professions Code §§ 17200 *et seq.* ("UCL").

20 II. PARTIES

21 5. Individual and representative plaintiff LAWRENCE REGIS HOUSE,
 22 JR is a resident of Simi Valley, California, and citizen of the State of California.

23 6. Defendant CARRIER IQ, INC. is incorporated in the State of
 24 Delaware, with its principal place of business in Mountain View, California.

25 7. Plaintiff is ignorant of the true names and capacities, whether
 26 individual, corporate, associate, or otherwise, of the defendants named herein as
 27 DOES 1 through 100, inclusive, or any of them and therefore sues said defendants,
 28 and each of them, by such fictitious names. Plaintiff is informed and believes and

1 thereon alleges that each of the fictitiously named defendants is responsible in some
 2 form or manner for the acts, events, occurrences or failures to act herein alleged and
 3 are liable to Plaintiff in connection therewith. Plaintiff will amend this complaint to
 4 set forth the true names and capacities of the defendants herein designated as DOES
 5 when they have been ascertained.

6 8. Plaintiff is informed and believes and thereon alleges that each
 7 defendant was and is, an agent, servant, employee, partner and/or joint venturer of
 8 each of the remaining Defendants and in doing the things herein alleged, each was
 9 acting within the course and scope of such agency, employment, partnership, and/or
 10 joint venture and with the knowledge, authority, permission and consent of the other
 11 respondents. Defendant and DOES 1 through 100, inclusive, are hereinafter
 12 collectively referred to as "Defendants" except when otherwise specified by name.

13 **III. JURISDICTION AND VENUE**

14 9. Pursuant to 28 U.S.C. §1331, this Court has original subject matter
 15 jurisdiction over the Class and the representative action arising under the Electronic
 16 Communications Privacy Act (18 U.S.C. §§ 1030, *et seq.*); the Computer Fraud and
 17 Abuse Act (18 U.S.C. §§ 1030, *et seq.*); Civil RICO; and the Federal Wiretap Act,
 18 18 U.S.C. §§ 2511.

19 10. The Court further has jurisdiction over Plaintiff's claims brought under
 20 California law pursuant to 28 U.S.C. § 1332, as amended by the Class Action
 21 Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), which
 22 explicitly provides for the original jurisdiction of the Federal Courts of any class
 23 action in which any member of the class is a citizen of a state different from any
 24 defendant, and in which the matter in controversy exceed in the aggregate the sum
 25 of \$5,000,000.00, exclusive of interest and costs, which is believed to be applicable
 26 to the instant case.

27 11. Pursuant to 28 U.S.C. §1337 The Court further has supplemental
 28 jurisdiction over the pendant state law claims because they are so related to the

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1 Federal Claims in this action that they form part of the same case or controversy
 2 under Article III of the United States Constitution.

3 12. Venue is proper in this Court pursuant to 28 U.S.C. § 1331(b) and (c)
 4 because Defendant CARRIER IQ resides in this district and a substantial part of the
 5 events or omissions giving rise to the claims occurred in this district.

6 **IV. FACTUAL ALLEGATIONS**

7 13. Defendant's pattern of behavior violates consumer protection laws as
 8 set forth herein, as well as the following statutes and regulations:

- 9 a. Federal Wiretap Act (18 U.S.C. §§ 2511, *et seq.*);
- 10 b. Computer Fraud and Abuse Act (18 U.S.C. §§ 1030, *et seq.*);
- 11 c. the California Consumer Protection Against Spyware act,
 Business & Professions Code §§ 22947, *et seq.*; and
- 12 d. California Penal Code §§ 631 and 637.2.
- 13 e. Consumer Legal Remedies Act California Civil Code §§ 1750 *et.*
 seq.
- 14 f. California Unfair Competition Law ("UCL") California Business
 & Professions Code §§ 17200 *et seq.*

15 14. Based on Defendants' wrongful conduct and violations of law, this
 16 complaint seeks restitution, jointly and severally from Defendants, of their ill-gotten
 17 gains, injunctive relief, costs, and attorneys' fees.

18 15. Under the UCL (predicated on violation of the laws listed above).
 19 Plaintiff brings this consumer protection action individually and on behalf of the
 20 general public to enjoin and compensate the victims of Defendants' predatory
 21 actions.

22 16. Within the four years preceding the filing of this Complaint, Plaintiff
 23 purchased a smartphone installed with the PRODUCT, in the State of California.
 24 Plaintiff and putative Class members have therefore suffered injury in fact in the
 25 total amount spent to purchase their smartphone and contract to pay for wireless

1 telephone and data service.

2 17. Plaintiff is entitled to an award of attorneys fees and costs in litigating
 3 this action because:

4 a. A successful outcome in this action will result in the enforcement
 5 of important rights affecting the public interest by maintaining the integrity of
 6 telecommunication services;

7 b. This complaint will result in a significant benefit to the general
 8 public or a large class of persons by compensating and/or restoring to consumers
 9 their loss resulting from ownership of merchandise with an operating system the
 10 consumers thought they were purchasing but were not;

11 c. The necessity and financial burden of private enforcement of
 12 these important public rights are such as to make an award of attorneys' fees
 13 appropriate; and

14 d. Unless the attorneys' fees and costs are awarded against
 15 Defendant, consumers will not recover the full measure of their damages.

16 **V. CLASS ACTION ALLEGATIONS**

17 18. Plaintiff brings this lawsuit on behalf of himself and all other similarly
 18 situated members of the general public. The Class the Plaintiff seeks to represent is
 19 composed of the following members of the general public:

20 **"All persons in the United States who, within the four years prior
 21 to the filing of this action and ongoing (the "Class Period"),
 22 purchased a smartphone installed with Carrier IQ software."**

23 19. Plaintiff seeks certification of a Nationwide Class. The Class is
 24 believed to comprise millions of members of the general public, whose joinder is
 25 impracticable, and whose class claims will provide substantial benefit both to the
 26 parties and the court system upon disposition. A well-defined commonality of
 27 interest in the questions of law and fact involved affects all parties represented.
 28 Common questions of law and fact predominate over the questions that may affect

1 individual Class Members, including but not limited to the following:

2 a. Whether Defendants owed a duty to the Class to give notice of
3 the existence and operation of the PRODUCT on Plaintiff's smartphone and
4 whether Defendants breached such duty;

5 b. Whether Defendants owed a duty to the Class to obtain
6 authorization from consumer users of Defendant's software in order to permit
7 operation of Defendants' PRODUCT, for the purposes of eavesdropping on data and
8 communications, and transmitting and/or storing such information, and whether
9 Defendants breached such duty;

10 c. Whether Defendants monitored, intercepted, recorded, and/or
11 stored data and other private information, or caused that to occur, from Plaintiff's
12 and Class Members' smartphones and sold and/or otherwise transferred such private
13 information to third parties;

14 d. Whether Defendants made false and misleading statements
15 and/or material omissions regarding the safety and security of the PRODUCT and/or
16 the smartphone;

17 e. Whether Defendants' conduct violates the Federal Wiretap Act
18 (18 U.S.C. §§ 2511, *et seq.*);

19 f. Whether Defendants' conduct violates the Computer Fraud and
20 Abuse Act (18 U.S.C. §§ 1030, *et seq.*);

21 g. Whether Defendants' conduct violates the California Consumer
22 Protection Against Computer Spyware Act;

23 h. Whether Defendants' conduct violates California Penal Code §§
24 631 and 637.2;

25 i. Whether Defendants' conduct violates the UCL and the CLRA;

26 j. Whether the Plaintiff and the other Class members are entitled to
27 declaratory and injunctive relief against the Defendants;

28 k. Whether Plaintiff and the other Class Members are entitled to

1 restitutionary disgorgement and/or other pecuniary damages; and

2 1. Whether Plaintiff and the other Class Members are entitled to
3 attorneys' fees and costs.

4 20. Plaintiff is a member of the general public who purchased a smartphone
5 with the Android operating system and the PRODUCT installed therein.

6 21. Plaintiff's claims are typical of the claims of the Class, and he will
7 fairly and adequately represent and protect the interests of the Class. Plaintiff does
8 not have any interests antagonistic to those of the Class. Plaintiff has retained
9 competent and experienced counsel in the prosecution of this type of litigation. The
10 questions common to the Class Members, some of which are set out above,
11 predominate over any questions affecting only individual Class Members.

12 22. A class action is superior to other available methods for the fair and
13 efficient adjudication of this controversy because the Class Members number in the
14 tens of thousands and individual joinder is impracticable, difficult or impossible for
15 the individual Class Members to prosecute their claims, and a class action will
16 conserve the resources of the Court.

17 23. Plaintiff's counsel are experienced class action attorneys and will fairly
18 and adequately represent all Class Members' interests.

19 24. Absent a class action and class certification, Defendants will likely
20 retain millions of dollars received as a result of their unlawful, unfair and deceptive
21 practices and will continue to extract millions of dollars in perpetration of such
22 practices.

23 **VI. CAUSES OF ACTION**

24 **FIRST CAUSE OF ACTION**

25 **For Violation of the Federal Wiretap Act**

26 **(18 U.S.C. §§ 2511. et seq.)**

27 **(Asserted by Plaintiff against all Defendants)**

28 25. Plaintiff incorporates by reference all the above (and below) allegations

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1 as if fully set forth herein.

2 26. Defendants intentionally intercepted, or endeavored to intercept or
3 enable third parties to intercept, electronic communications of Plaintiff and Class
4 Members in violation of 18 U.S.C. §§ 2511, *et seq.* (the "Federal Wiretap Act"). In
5 addition, Defendants intentionally used, or endeavored to use, the contents of
6 electronic communications of Plaintiff and Class Members, knowing that the
7 information was obtained through the interception of an electronic communication,
8 in violation of the Federal Wiretap Act.

9 27. The electronic communications Defendants intercepted, caused to be
10 intercepted, and/or used were not made through an electronic communication
11 system that was readily accessible to the general public. To the contrary, the very
12 nature of the electronic communications Defendants intercepted and/or used was
13 private and confidential to Plaintiff and Class Members.

SECOND CAUSE OF ACTION

For Violation Of the Computer Fraud And Abuse Act

(18 U.S.C. §§ 1030, et seq.)

(Asserted by Plaintiff against all Defendants)

18 28. Plaintiff incorporates by reference all the above (and below) allegations
19 as if fully set forth herein.

20 29. All smartphones equipped with the Carrier IQ Software operated by
21 Plaintiff and Class Members are "computers" within the meaning of 18 U.S.C. §
22 1030(e)(1) because they are high speed data processing devices that perform logical,
23 arithmetic, or storage functions.

24 30. Plaintiff's and Class Members' smartphones are "protected computers"
25 within the meaning of 18 U.S.C. § 1030(e)(2)(B) *et seq.* because they are used in
26 interstate commerce or communication, by, *inter alia*: (1) intentionally accessing
27 Plaintiff's and Class Members' smartphones without authorization or exceeding
28 authorized access, thereby obtaining information from their smartphones; (2)

1 intentionally accessing Plaintiff's and Class Members' smartphones without
2 authorization, and as a result, recklessly causing damage; and/or (3) intentionally
3 accessing Plaintiff's and Class Members' smartphones without authorization, and as
4 a result, causing damage and loss.

5 31. Defendants intentionally accessed Plaintiff's and Class Members'
6 smartphones without authorization or exceeded their authorized access, and thereby
7 obtained information from their smartphones. Defendants monitored, logged, and
8 recorded the keystrokes Plaintiff and Class Members made in their smartphones,
9 obtaining information regarding Plaintiff's and Class Members' telephone calls, text
10 messages, web browsing, and other activities.

11 32. Defendants intentionally accessed Plaintiff's and Class Members'
12 smartphones without having received informed consent and recklessly caused
13 damage by impairing the integrity of data or information on their smartphones.
14 Specifically, Defendants' conduct jeopardized the private and confidential nature of
15 Plaintiff's and Class Members' activities on their smartphones. Defendants
16 intentionally accessed Plaintiff's and Class Members' smartphones without
17 authorization and caused damage and loss by forcing Plaintiff and Class Members to
18 incur costs in responding to Defendants' offense, conduct a damage assessment,
19 cease use of the smartphone, pay more for the smartphone when purchased at a price
20 that exceeded the value of the merchandise had the true facts described herein been
21 disclosed, pay for an illegal devise that would not have been purchased if the true
22 facts had been disclosed, and/or attempt to uninstall or disable Defendants' software.

23 33. As a direct result of Defendants' conduct, Defendants obtained
24 information valued over \$5,000, caused damage exceeding an aggregate of \$5,000
25 in value during a one-year period, and damaged 10 or more "protected computers"
26 during a one-year period.

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28

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1 **THIRD CAUSE OF ACTION**

2 **For Violation of the Consumer Protection Against Computer Spyware Act**
 3 **(California Business & Professions Code § 22947, et seq. "CPACSA")**
 4 **(Asserted by Plaintiff against all Defendants)**

5 34. Plaintiff incorporates by reference all the above (and below) allegations
 6 as if fully set forth herein.

7 35. Defendants' PRODUCT is malware software deceptively or
 8 surreptitiously installed on consumer user computers, namely smartphones, by
 9 means of an intentional and material failure to provide any notice to a consumer user
 10 regarding the installation or existence of software permitting illegal invasion of
 11 privacy rights, which results in deception of the consumer user.

12 36. Defendants are not authorized users of Plaintiff's smartphone, as
 13 defined in Section 22947.1. On information and belief, Defendants are using the
 14 PRODUCT in a manner in excess of, or in a manner unauthorized under, Section
 15 22947.3(d).

16 37. Defendants knew, consciously avoided actual knowledge that their
 17 software would be copied, or willfully caused their software to be copied, onto the
 18 smartphones of consumers in the State of California, including Plaintiff and putative
 19 Class members.

20 38. On information and belief, Defendants used the PRODUCT to collect,
 21 through intentionally deceptive means, identifiable personal information, including,
 22 but not limited to:

- 23 a. through the use of a keystroke-logging function that records all
 24 keystrokes made by an authorized user who uses the computer and
 25 transfers that information from the computer to another person; and,
- 26 b. by monitoring and recording all or substantially all of the Websites
 27 visited by the consumer, other than Websites of the provider of the
 28 software.

1 39. Defendants installed the PRODUCT in a manner which was designed
2 to, and did, conceal from consumers the fact that the software was installed on the
3 smartphone purchased and used by the consumers. Defendants, on information and
4 belief, accessed or used consumer's Internet service for the purpose of causing a
5 smartphone user, namely the Plaintiff and putative class, to incur financial charges
6 for bandwidth and related data services not authorized by such consumers. The
7 PRODUCT and its hidden nature prevented reasonable efforts by authorized users
8 of smartphones to disable such software.

9 40. Defendants' conduct violated the CPACSA, causing damage to Plaintiff
10 and the putative class, including but not limited to causing them to incur loss of use
11 of their smartphones and charges from any attempt to uninstall the PRODUCT.

12 41. Plaintiff seeks an award of statutory damages and any actual damages,
13 court costs, attorney's fees, and any other relief the Court deems proper, for
14 Defendants' violation of the CPACSA.

15 42. As a result of Defendants' violations of the CPACSA, Plaintiff and the
16 putative class have suffered, and are suffering, irreparable injury. Unless restrained
17 by this Court, such injuries will continue to be inflicted. Plaintiff also seeks
18 injunctive relief as set forth herein.

FOURTH CAUSE OF ACTION

For Violation of California Penal Code Sections 631 and 637.2

(Asserted by Plaintiff against all Defendants)

22 43. Plaintiff incorporates by reference all the above (and below) allegations
23 as if fully set forth herein.

24 44. In violation of California Penal Code §631, Defendants, without the
25 willful consent of Plaintiff and the Class members, made an unauthorized
26 connection to Plaintiff's and the putative Class members' smartphones over the
27 Internet in this State.

28 45. In violation of California Penal Code § 631, Defendants, without

1 having obtained the informed consent of the Plaintiff and putative Class members,
2 attempted to use and did use and communicate, and did aid, agree and conspire to
3 use, the information wrongfully obtained in violation of § 631. Pursuant to
4 California Penal Code § 637.2(c), which specifically states that actual damages or
5 the threat of actual damages are unnecessary for recovery, Plaintiff and each
6 putative Class member is entitled to \$5,000, or three times the actual damages
7 sustained, whichever is greater.

8 46. Pursuant to California Penal Code §637.2(b), Plaintiff and the putative
9 Class members also request that Defendants' conduct, as alleged herein, be enjoined
10 and restrained.

FIFTH CAUSE OF ACTION

For Violation of California's Unfair Competition Law ("UCL")

(California Business & Professions Code §17200 et seq.)

(Unfair and Fraudulent Conduct Prongs)

(Asserted by Plaintiff against all Defendants)

16 47. Plaintiff incorporates by reference all the above (and below) allegations
17 as if fully set forth herein.

18 48. Within the four years preceding the filing of this Complaint,
19 Defendants have violated the fraudulent/ deceptive prong of the UCL by the conduct
20 described above.

21 49. Defendants' fraudulent and deceptive practices described above present
22 a continuing threat to the Plaintiff and members of the putative class and general
23 public in that Defendants persist and continue to engage in these unfair competition
24 practices and will not cease doing so unless and until this Court issues an injunction.

25 50. Plaintiff is informed and believes that, as a result of the Defendants'
26 fraudulent and deceptive practices, the Defendants have received and continue to
27 financially benefit, and/or collect and hold revenues flowing from their customers
28 use and/or purchase of the PRODUCT on their smartphones. The Defendants have

1 failed to refund any of these revenues to customers.

2 51. Therefore, pursuant to Business and Professions Code section 17203,
3 Plaintiff seeks an order of this Court permanently enjoining Defendants from
4 engaging in the unfair conduct as alleged herein, and ordering that Defendants make
5 full restitution of all monies expended by Plaintiff and the putative class to purchase
6 smartphones containing the PRODUCT, disgorge all ill-gotten revenues and/or
7 profits, recall all smartphones with the PRODUCT, and stop collecting,
8 transmitting, storing private information and/or invading privacy rights of
9 consumers through use of the PRODUCT.

SIXTH CAUSE OF ACTION

For Violation of California's 'UCL'

(Business & Professions Code §17200 et seq.)

(Unlawful Practices)

(Asserted by Plaintiff against all Defendants)

15 52. Plaintiff incorporates by reference all the above (and below) allegations
16 as if fully set forth herein.

17 53. Defendants violated the unlawful prong of the UCL by violating the
18 Federal Wiretap Act, 18 U.S.C. §§ 2511. *et seq.*; the Computer Fraud And Abuse
19 Act, 18 U.S.C. §§ 1030, *et seq.*; the California Consumer Protection Against
20 Spyware act; and California Penal Code §§ 631 and 637.2.

21 54. Plaintiff, has suffered harm as a result of Defendants' violations of the
22 unlawful prong of the UCL because he has paid monies for a smartphone sold with
23 the PRODUCT, that he otherwise would not have purchased or paid as much had he
24 known the true facts. He is unable to uninstall the PRODUCT from his smartphone
25 causing his smartphone to become inoperable and/or *de facto* unusable by virtue of
26 its continued violation of laws as set forth herein.

27 55. The Defendants' unlawful practices described above present a
28 continuing threat to the Plaintiff and members of the putative class and the public in

1 that Defendants persist and continue to engage in these practices, have not
2 abandoned or censored the continuing violative operations described herein, and
3 will not cease doing so unless and until this Court shall issue an injunction.

4 56. As a direct result of the Defendants' unlawful practices, the Defendants
5 have received and continue to collect and hold revenues from the sale of the
6 PRODUCT and/or Plaintiff and the class' use and continuing use of the smartphones
7 installed with the PRODUCT. The Defendants have failed to refund any of these
8 revenues to customers. These revenues properly belong to members of the general
9 public who purchased smartphones with the PRODUCT installed, and they are
10 entitled to and should receive restitution of all such monies jointly and severally
11 from all Defendants.

12 57. Therefore, pursuant to Business and Professions Code section 17203 et
13 seq., Plaintiff seeks an order of this Court permanently enjoining Defendants from
14 engaging in the unfair conduct as alleged herein, and requiring that Defendants
15 make full restitution of all monies wrongfully obtained, disgorge all ill-gotten
16 revenues and/or profits, recall all smartphones with the PRODUCT, and to stop
17 collecting, transmitting, storing, or enabling the foregoing, of private information
18 and/or invading privacy rights of consumers.

SEVENTH CAUSE OF ACTION

For Violation of California's 'UCL'

(Business and Professions Code § 17200 et seq.)

(Unfair Practices)

(Asserted by Plaintiff against all Defendants)

24 58. Plaintiff incorporates by reference all the above (and below) allegations
25 as if fully set forth herein.

26 59. Defendants' conduct, described herein above, violates the unfair
27 conduct prong of the UCL because such conduct violates various laws and policies
28 recognized by public policy, the Federal and California Legislature, and the

1 California courts, and because the utility of Defendants' conduct, if any, is
2 significantly outweighed by the gravity of the harm it imposes on consumers, and
3 because Defendants' business practices described herein are oppressive,
4 unscrupulous or substantially injurious to consumers.

5 60. Defendants' unfair practices as described above present a continuing
6 threat to the Plaintiff, members of the putative class, and members of the public in
7 that Defendants persist and continue to engage in these practices and will not cease
8 doing so unless and until this Court shall issue an injunction.

9 61. As a direct result of the Defendants' unfair practices, the Defendants
10 have received, and continue to collect and hold, revenues which properly belong to
11 consumers who purchased smartphones with the PRODUCT installed, and they are
12 entitled to and should receive restitution of all such monies jointly and severally
13 from all Defendants. Defendants have failed to refund any of these revenues to
14 Plaintiff and putative class members.

15 62. Therefore, pursuant to Business and Professions Code section 17203 et
16 seq., Plaintiff seeks an order of this Court permanently enjoining Defendants from
17 engaging in the unfair conduct as alleged herein, make full restitution of all monies
18 wrongfully obtained, disgorge all ill-gotten revenues and/or profits, recall all
19 smartphones with the PRODUCT, and to stop collecting, transmitting, storing
20 private information and/or invading privacy rights of consumers.

EIGHT CAUSE OF ACTION

Violation of the Consumer Legal Remedies Act

23 (Asserted by Plaintiff against all Defendants, on behalf of a subclass, and at this
24 time solely for injunctive relief as explained below)

25 63. Plaintiff incorporates by reference all the above (and below) allegations
26 as if fully set forth herein, excluding for the present any allegation purporting to
27 seek damages at this time, as explained herein.

28 64. Plaintiff asserts this cause of action on behalf of members of a putative

1 sub-class, limited to only those individuals who within three years of the filing of
2 this complaint purchased for personal, family or household purposes a smartphone
3 installed with the PRODUCT. Plaintiff is a member of the putative sub-class in that
4 he purchased and used for personal purposes a smartphone installed with the
5 PRODUCT

6 65. Plaintiff has standing to pursue this claim as Plaintiff has suffered
7 injury in fact and has lost money or property as a result of Defendants' actions as set
8 forth herein and above. He purchased a smartphone with installed with the
9 PRODUCT without having been informed as to the illegal operations of the
10 software in the smartphone and/or that use of the software would permit, and did
11 cause, private and/or personal information to be transmitted to third parties, and he
12 has ceased to use the illegal phone.

13 66. Defendants have represented, and/or by virtue of material omissions
14 implicitly represented, that the software has characteristics, uses, benefits, or
15 qualities that it does not have, in violation of Civil Code §1770(a)(5). Defendants
16 have also represented that the software has a particular standard or quality that it
17 does not have in violation of Civil Code §1770(a)(7).

18 67. Defendants have represented, and/or by virtue of material omissions
19 implicitly represented, that a transaction confers or involves rights, remedies or
20 obligations which it does not have or involve, in violation of Civil Code
21 §1770(a)(14).

22 68. Defendants have represented, and/or by virtue of material omissions
23 implicitly represented, that a transaction confers or involves rights, remedies or
24 obligations which are prohibited by law, in violation of Civil Code §1770(a)(14).

25 69. Defendants' practices, acts and course of conduct as described above,
26 are likely to mislead a reasonable consumer acting reasonably under the
27 circumstances to his or her detriment. Plaintiff and other members of the putative
28 Class would not have purchased the smartphone with the software if the truth and all

1 facts concerning the software had been disclosed to him.

2 70. Plaintiff and other members of the putative Class have each been
 3 directly and proximately injured by the conduct of Defendants, and such injury
 4 includes payment for a smartphone installed with the PRODUCT so as to enable the
 5 wrongful activities described herein to occur.

6 71. Plaintiff has filed concurrently herewith the declaration of venue
 7 required by Civil Code Section 1780(d).

8 72. Defendants' wrongful business practices constitute a continuing course
 9 of conduct in violation of the California Consumer Legal Remedies Act since the
 10 wrongful conduct described herein continues to occur and Plaintiff and the putative
 11 sub-class continue to suffer harm.

12 73. In accordance with California Civil Code § 1780 (a), Plaintiff and the
 13 members of the sub-Class currently seek only injunctive relief as to Defendants'
 14 violation of the CLRA, described as: an order of this Court permanently enjoining
 15 Defendants from engaging in the wrongful conduct as alleged herein, requiring that
 16 Defendants recall all smartphones installed with the PRODUCT, and stop collecting,
 17 transmitting, storing private information and/or invading privacy rights of
 18 consumers.

19 74. *Notice Pursuant to Civil Code § 1782.* As a direct and proximate
 20 result of Defendants' violations of law, Plaintiff and the Class have been injured.
 21 Pursuant to the provisions of California Civil Code § 1782, Plaintiff demands that
 22 within thirty (30) days from service of this Complaint, Defendants adequately
 23 correct, repair, replace or otherwise rectify the deceptive practices described in this
 24 Complaint for the Class, pursuant to California Civil Code § 1770. This includes
 25 providing notice and full compensation to consumers who have purchased the
 26 product within the sub-class period, as well as ceasing the conduct described herein.
 27 If Defendants fail to do so, Plaintiff will amend this Complaint to seek damages
 28 pursuant to Civil Code § 1782. Contemporaneously with the filing of this complaint,

1 a certified letter has been sent to Defendants and each of them in compliance with
 2 the CLRA, and Plaintiff reserves the right to amend this complaint as permitted by
 3 the CLRA to seek relief in addition to the injunctive relief which now is the sole
 4 relief sought pursuant to the CLRA.

5 **NINTH CAUSE OF ACTION**

6 **Restitution of Unjust Enrichment**

7 **(Asserted by Plaintiff against all Defendants)**

8 75. Plaintiff incorporates by reference all the above (and below) allegations
 9 as if fully set forth herein.

10 76. This cause of action is being asserted on behalf of Plaintiff and the
 11 putative Class members who purchased smartphones with the PRODUCT installed
 12 within the applicable statute of limitations period.

13 77. Defendants have benefited and have been unjustly enriched by the
 14 above-alleged conduct.

15 78. Defendants have knowledge of this benefit, and have voluntarily
 16 accepted and retained this benefit.

17 79. The circumstances as described herein are such that it would be
 18 inequitable for Defendants to retain these ill-gotten benefits without paying the
 19 value thereof to Plaintiff and the putative Class members.

20 80. Plaintiff and the putative Class members are entitled to the amount of
 21 Defendants' ill-gotten gains, including interest, resulting from their unlawful, unjust
 22 and inequitable conduct as described above.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

25 FOR THE FIRST CAUSE OF ACTION:

26 1. Pursuant to 18 U.S.C. § 2520, an award of statutory damages of
 27 whichever is the greater of \$100 a day for each day of violation or \$10,000 per Class
 28 Member

1 2. An award of punitive damages;

2 FOR THE FIRST THROUGH FOURTH CAUSES OF ACTION:

3 3. An award of general damages according to proof;

4 4. An award of special damages according to proof.

5 FOR THE FOURTH CAUSE OF ACTION:

6 5. An award of \$5,000.00 per class member or treble damages according
7 to proof, whichever is greater.

8 FOR ALL CAUSES OF ACTION, OTHER THAN THE EIGHTH CAUSE OF
9 ACTION:

10 6. An Order certifying the Class and any appropriate sub-class thereof,
11 and appointing Plaintiff and his attorneys to represent the Class;

12 7. An award of restitution in an amount according to proof;

13 8. Disgorgement in an amount according to proof;

14 9. For a temporary, preliminary and permanent injunction enjoining the
15 Defendant, and each of them, from engaging in the acts of unfair competition
16 alleged above and compelling Defendants, jointly and severally, to remove the
17 PRODUCT from the Class' smartphones via software update, and all versions of
18 Android on shelves and the distribution chain and restore to the Plaintiff and the
19 members of the class all general funds acquired by the means of any practice found
20 by this Court to be unlawful or constitute unfair competition.

21 10. For a reasonable fee to Plaintiff for his services in bringing this action
22 on behalf of the general public;

23 11. For reasonable attorneys' fees; and for costs of suit,

24 12. For such further relief as the Court may order.

25 FOR THE EIGHTH CAUSE OF ACTION:

26 13. An Order certifying the Class and any appropriate sub-class thereof,
27 and appointing Plaintiff and his attorneys to represent the Class;

28 14. For a temporary, preliminary and permanent injunction enjoining the

1 Defendant, and each of them, from engaging in the acts of alleged above, recall all
2 smartphones installed with the PRODUCT, and to stop collecting, transmitting,
3 storing private information and/or invading privacy rights of consumers.

4 15. For a reasonable fee to Plaintiff for his services in bringing this action
5 on behalf of the general public;

6 16. For reasonable attorneys' fees; and

7 17. For costs of suit, and for such further relief as the Court may order.

8 DATED: December 9, 2011

**WASSERMAN, COMDEN,
CASSELMAN & ESENSTEN, L.L.P.**

10 By: 

11 JESSE B. LEVIN
12 Attorneys for Plaintiff LAWRENCE REGIS
13 HOUSE, JR., individually and on behalf of
14 others similarly situated

15 **JURY DEMAND**

16 1. Plaintiff hereby demands a trial by jury of their claims against
17 Defendants.

18 DATED: December 9, 2011

**WASSERMAN, COMDEN,
CASSELMAN & ESENSTEN, L.L.P.**

20 By: 

21 JESSE B. LEVIN
22 Attorneys for Plaintiff LAWRENCE REGIS
23 HOUSE, JR., individually and on behalf of
24 others similarly situated